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CERTIFICATE.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1911.

No. [redacted]233

AMERICAN IRON & STEEL MANUFACTURING COMPANY, APPELLANT,

versus

SEABOARD AIR LINE RAILWAY AND S. DAVIES WARFIELD, R. LANCASTER WILLIAMS AND E. C. DUNCAN, RECEIVERS OF THE SEABOARD AIR LINE RAILWAY,

APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 1064.

AMERICAN IRON & STEEL MANUFACTURING COMPANY, APPELLANT,

versus

SEABOARD AIR LINE RAILWAY AND S. DAVIES WARFIELD, R. LANCASTER WILLIAMS AND E. C. DUNCAN, RECEIVERS OF THE SEABOARD AIR LINE RAILWAY,

APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

CERTIFICATE OF QUESTION BY THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

This cause coming on for hearing before the Court, after full argument, it is ordered, in view of the general importance of one of the questions or propositions of law arising on the record, and the difference of opinion in this Court as to the correct decision thereof, that that question, raised on said appeal, be certified to the Supreme Court of the United States for instruction for its proper decision, and that accompanying said

question there shall also be certified a statement from which said question can be understood, which statement and question are as follows:

Statement of Facts.

Upon a bill filed by a railway company alleging its insolvency and consequent inability to maintain itself as a going concern, except through the medium of a receivership, receivers were appointed. The bill alleged that a receivership would enable the property of the Railway Company to be preserved and maintained as a whole, and the sums due and to become due to the bondholders and creditors to be secured and ultimately paid in full.

The trustee in the first mortgage answered the bill admitting its allegations, and afterwards filed a cross bill again admitting the allegations of the bill in regard to the insolvency of the company. The suit was not a creditors' suit. The trustee subsequently filed a bill in the same Court to foreclose the mortgage, seeking a sale of the equity of redemption, and the two suits were consolidated. No prior encumbrancers were made parties to either suit. Prior to the receivership the claimant furnished supplies to the railway company, for which, shortly after the receivers were appointed, a lien was duly perfected under the statute of Virginia known as the Labor and Supply Lien Statute, Code of Va., Sec. 2485. The supplies were sold on a credit of "30 days, one per cent. discount allowed for payment in 10 days." Claimant filed its claim before the Special Master in the receivership proceedings, relying upon a statutory lien under the statute above mentioned. The Special Master reported against the allowance of interest on the claim, to which report in that particular claimant excepted.

Subsequently, on the petition of the railway company, a decree was entered approving "a plan of adjustment" of the finances of the company, and providing for turning back to the company its property, and for ending the receivership at a certain time. From time to time during the receivership and at the ratification of the plan of adjustment, and as a part thereof, all interest due at the time of the appointment of the receivers and accruing during the receivership on all the funded and many of the floating obligations of the Railway Company were

paid in full. The amount so paid for interest aggregated some millions of dollars.

The decree approving the plan of adjustment provided that the company should pay in due course of business all its obligations, liabilities and indebtedness, and reserved the right, in the event of default in that regard, to any claimant aggrieved by such default, to present his petition to the Court to have his claim enforced "to the same extent as though the receivership had continued."

After the receivership had been thus terminated, claimant filed its petition in the Court praying that its exceptions to the Special Master's report should be sustained and for the enforcement of its claims, including interest thereon during the period of the receivership, and seeking to enforce it not upon the doctrine of an equitable lien, but as a statutory lien. The Circuit Court refused to allow interest for the period of the receivership, and from that ruling an appeal was taken.

Question.

Is interest recoverable on such a claim for the period of the receivership?

Witness our hands this 13th day of March, 1912.

NATHAN GOFF,
Senior Circuit Judge.
ALSTON G. DAYTON,
District Judge, Northern District of West Virginia.
JOHN C. ROSE,
District Judge, District of Maryland.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit. } *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true copy of the original certificate of the question or proposition of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the

{Seal of Court} seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 10th day of April, A. D., 1912.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit.

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Supreme Court of the United States

OCTOBER TERM, 1913.

No. 233.

AMERICAN IRON & STEEL MANUFACTURING CO.,
APPELLANT,

versus

SEABOARD AIR LINE RAILWAY AND S. DAVIES WARFIELD, R. LANCASTER WILLIAMS, AND E. C. DUNCAN, RECEIVERS OF THE SEABOAD AIR LINE RAILWAY,
APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE APPELLANT.

GEORGE WAYNE ANDERSON,
Solicitor for Appellant.

Henry R Pollard

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 233.

AMERICAN IRON & STEEL MANUFACTURING CO.,
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SEABOARD AIR LINE RAILWAY AND S. DAVIES WARFIELD, R. LANCASTER WILLIAMS, AND E. C. DUNCAN, RECEIVERS OF THE SEABOAD AIR LINE RAILWAY,
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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

The certificate of the Circuit Court of Appeals states the case and the facts need not be repeated here.

SPECIFICATION OF ERRORS.

The errors complained of are these:

1. The court overruled appellant's exceptions to the Master's report denying interest on the amount secured by his statutory supply lien.

2. The court dismissed appellant's petition filed herein prior to the determination of the said exceptions, but after the proved solvency of the company, and its resumption of control over its property.

The said petition prayed for the allowance of interest on said claim in view of the said solvency and resumption of control, even though the exceptions themselves should not be sustained.

3. The court held that the receivership put an end to the running of interest on statutory supply lien claims, that is to say, that the security and priority of the lien did not cover interest on the claim.

4. It so held, notwithstanding the contract of sale in this case clearly implies a promise to pay interest.

5. It so held, notwithstanding at the time of the decree there was established solvency and abundant assets.

6. It so held, notwithstanding an enormous diversion of funds.

7. It so held, although the only creditors contesting appellant's claim, if any such were contesting, were the bondholders over whose claims the statute expressly gave appellant priority.

8. It so held, although there was no real contest between creditors, as the record shows that the bondholders received principal and interest, and the allowance of appellant's claim would not and could not deprive any creditor of a cent.

9. It so held, although denial of interest to appellant is a benefit to the debtor alone, and the interest rule relied on has no application whatever in such a case.

10. It so held, although there was vexatious and unreasonable delay in payment without fault or laches of appellant.

11. The court denied interest to appellant and yet decreed interest throughout the receivership on floating debts, collateral loans and unsecured liabilities.

12. It denied interest to appellant and yet gave interest to the bondholders and on underlying securities.

BRIEF OF THE ARGUMENT.

The facts, we think, present an extraordinary case. The claim is of an exemption from payment of interest upon an interest bearing debt, when the debt itself is not contested. The debt is interest bearing because "the supplies were sold on a credit of thirty days, one per cent. discount allowed for payment in ten days." This was an express term of credit, and interest is always allowed at the expiration of an express or of an implied term of credit, for such is the implied contract of the parties. *Curtis* v. *Inerarity*, 6 How., 146, 154; *Spalding* v. *Mason*, 161 U. S., 375, 396; *Phosphate Co.* v. *Grafflin*, 114 U. S., 500. The nature of the promise implies the payment of interest. Moreover the filing of a lien is equivalent to an account stated, *Construction Co.* v. *R. etc. R. Co.*, 68 Fed., 105, 115, and interest is allowed on a stated account, *Young* v. *Godbe*, 15 Wall., 562.

Again, the debt was secured by a lien duly perfected under the Statute of Virginia, which gives priority to the lienor over mortgages. Since the debt is an interest bearing debt, it follows that "the security and priority of the lien attach as well to the interest as to the principal." *Trust Co.* v. *Condon*, 67 Fed., 84, 98 (C. C. A.); *Construction Co.* v. *R. etc. R. Co.*, 68 Fed., 116; 34 L. R. A., 663; *Jourolmon* v. *Ewing*, 85 Fed., 103, 105.

The appellees seek to avoid the logic of this conclusion by an appeal to *Thomas* v. *Western Car Co.*, 149 U. S., 95, and the following case:

A railroad company, bonded for millions, both on its own mortgages and the underlying mortgages of its constituent roads, alleged an impending default on mortgage obligations and inability to pay several million dollars of unsecured debts and floating obligations. It put itself in the hands of receivers upon the allegation that only so could it be kept intact as a going concern, and "the sums due and to become due to the bondholders and creditors be secured and ultimately be paid in full." The receivers refused to pay interest on all claims except those favored by them, despite statutes giving prior liens. During the receivership millions of dollars were paid in interest by

the receivers to the mortgagees and on unsecured liabilities and floating debts selected by them. After remaining in this bomb proof as long as it pleased, the road claimed solvency and presented an adjustment plan, whereby it paid all defaulted interest to the mortgagees, but refused interest to the appellant, whose exceptions to the Master's report denying interest had never been disposed of, and although under the decree he presented his petition to enforce his claim. This petition was an intervention, and in the nature of a bill to enforce the lien on the franchises and property of the road, even if the filing of his lien was not.

Appellant's case is thus distinguished from *Solomons* v. *B. & L. Ass'n*, 116 Fed., 676, and should be allowed interest even under the rule there laid down. There is no deficiency of assets; no contest between creditors of equal rank; nor indeed between any creditors. The mortgages have been paid in full with interest. The assets and earnings are ample. No creditor will be deprived of a penny by payment to the appellant, and no one will benefit by a refusal except the debtor. If interest can be refused under those circumstances the supply lien statute is a snare and a delusion; nay more, a way has been found to pay inferior lienors at the expense of those declared by statute to be superior to them; and to relieve a temporary embarrassment of any great corporation by a voluntary seclusion until such time as the monies made with the amounts thus withheld, or denied, with which securities deposited as collateral may be redeemed or permanent improvements, betterments and extensions may be made for the benefit of the mortgagees, satisfy those in charge of the operation. We submit that this is not the law and for the following reasons:

I.

The lien is given by statute. It is absolute and mandatory. It is not dependent upon a rule of court, nor upon the varying equities of particular cases.

It is not subject to the six months' rule, and is not limited to supplies furnished within a reasonable time prior to the receiver-

ship. It extends to the date of the earliest unsettled item, which in this case was April 3, 1907. Mortgagees and other creditors take with notice of its priority, and subject thereto.

The Code of Virginia provides as follows:

> Sec. 2485. "All persons furnishing railroad iron * * * and all other supplies necessary to the operation of any railway * * * shall have a prior lien on the franchises, gross earnings, and on all the real and personal property of said company, which is used in operating the same, to the extent of the money due them by said company for such * * * supplies. And no mortgage, deed of trust, sale, hypothecation, or conveyance * * * shall defeat or take precedence over said lien."
>
> Sec. 2486. "No person shall be entitled to the lien given by the preceding section unless he shall within ninety days after the last item of his bill becomes due and payable for which such supplies are furnished * * * file in the clerk's office of the court of the county or corporation in which is located the chief office in this State of the company against which the claim is * * * a memorandum of the amount and consideration of his claim, verified by affidavit * * * any such lien may be enforced in a Court of Equity." *Va. Devel. Co.* v. *Crozier Iron Co.*, 90 Va., 126; *Newgass* v. *A. & D. R. Co.*, 56 Fed., 676.

A. The lien and its priority is binding as against receivers although the steps required to perfect it were taken after their appointment.

To say the contrary is to say that a receivership destroys the lien, or to deny that a lien is given by V. C. 2485.

The latter is contrary to the plain terms of the statute, and the former is contrary to principle and authority.

Mott & als. v. *Wissler Min. Co.*, 135 Fed., 697, C. C. A.

In that case it was held:

> "The lien provided attaches when the supplies are furnished and is an existing lien from that time."

The general doctrine is, that, "a statute creating a lien being

remedial in its nature is to be liberally construed so as to give full effect to the remedy in view of the beneficial purpose contemplated by it, 19 Am. & E. Ency. L., p. 24." *Mott.* v. *Wissler & Co.*, 135 Fed., 700, 701; *Davis* v. *Alvord*, 94 U. S., 549; *Nat. Bank* v. *Iron Co.*, 35 Fed., 443; *Guardian Trustee & Depst. Co.* v. *Fisher et als.*, 115 Fed., 184; 200 U. S., 57.

It was accordingly held that adjudication in bankruptcy against the debtor between the date of maturity of the last item of his account and the recording of his claim did not destroy the lienor's right to priority in the distribution of the bankrupt's estate.

In Re West Norfolk Lumber Co., 112 Fed., 760.

Held: The lien dates from the time supplies are furnished, it relates back to that time, the provisions of V. C. 2486 merely fix the limit of time *after which* a lien claim cannot be filed. In *Seventh Nat. Bank* v. *Shenandoah Iron Co.*, 35 Fed., 437, 443, a receivership suit, Paul, J., held:

1. Recording a lien is in no respect a legal proceeding in the nature of a suit.

2. The limitation that the claim must be filed within six months ceases to run from the entry of a decree to take an account of debts, citing *Harvey* v. *Steptoe*, 17 Gratt., 304.

This was again held by Goff & Hughes, J. J., in the receivership case of *Newgass* v. *A. & D. R. Co.*, 56 Fed., 676, 685.

In *Same* v. *Same*, 72 Fed., 712, 716, Hughes, J., held: the limitation requiring the lien to be filed ceased to run at the time of filing creditor's bill, saying, "The authority on which this doctrine is based is the leading case of *Sterndale* v. *Hankinson*, 1 Sim., 393, and it is settled beyond all controversy, for the Federal courts, by the case of *Richmond* v. *Irons*, 121 U. S., 29, 52, 54."

See also *Fidelity Ins. Co.* v. *Roanoke Iron Co.*, 81 Fed., 439, 453; *Trust Co.* v. *Condon*, 67 Fed., 99,

Bank v. *Trigg Co.*, 106 Va., 327.

In the case at bar the Master held without objection that the filing of the bill herein suspended the necessity of maturing liens in the clerk's office, and they were asserted and enforced by filing

with the Master herein after the appointment of receivers.

The 12th report therein, confirmed and acted upon without objection by appellees, held as follows:

> "So then a court taking possession of R. R. property, if it finds inchoate liens not matured because the time for maturing them has not expired should protect the lien as a necessary incident of equitable administration. Maturing in the clerk's office is an act in pais, and the object is to give notice, which reason ceases when the property is in court."

The Master goes on to describe the bill in this case as *"a bomb proof bill in the interest of the debtor,"* and says: "the nearest analogy is a voluntary petition in bankruptcy in which the statute of limitations ceases to run, citing: Eldridge in re 2 Hughes, 256; 8 Fed. Cas. No. 4331; Wright in re 6 Biss, 317; 30 Fed. Cas. No. 18068.

We conceive it to be established, then, that the validity of the lien is not affected by the fact that it was perfected after the appointment of receivers. 56 Fed. 676; 72 Fed. 712, supra; *Kahle* v. *Oil Co.*, 51 W. Va., 313; *Mott & als.* v. *Wissler Min. Co.*, 135 Fed. 697; In Re West Norfolk Lumber Co., 112 Fed., 767; *Richmond* v. *Irons*, 121 U. S., 27; *National Bank* v. *Iron Co.*, 35 Fed., 436.

In 112 Fed., 767, it was said:

> "The only requirement is *that the lien shall be filed;* the lien secured relates back: * * * There is nothing incongruous or unusual in having security for a debt which although due and owing is not yet payable. It is just what is done in nearly every trust deed or mortgage * * The word 'due' in this section (V. C. 2485) should be construed as meaning 'owing' rather than 'payable.'"

And finally, the Special Master in his 5th report, as stated in the stipulation, R. p. 12, reported appellants claim as privileged

and as a statutory lien. This report was not excepted to by the appellees and was confirmed. Nor was the claim of priority over the receivers as a statutory lienor denied or contested before the Master. On the contrary, notwithstanding the decree of January 2, 1908, authorizing the receivers to pay supply claims, restricted them to the six months rule, R. p. 3, and although that is the only decree authorizing payment of supply claims, the receivers attempted to pay the claim of appellant, except interest, although it reached back through a period of nine months, to-wit, to April 3, 1907.

Such facts constitute an admission of record that appellant has a prior lien as against the receivers, as well as against the railway, and appellees can not now be heard to contest the fact.

B. Granted that the lien of appellant was an existing lien as against the receivers, their appointment does not divest liens previously acquired for they take no better title than the debtor.

High Receivers, 4 ed. Secs. 138 and 440.

Prior legal claims upon property in the hands of a receiver will be preserved in equity.

Wiswall v. *Sampson*, 14 How., 52.

It is, we submit, just because supply claimants, laborers and material men, are not in position to protect themselves that the statute give them a prior lien for the amount owing them which relates back to the time of their services, if claimed in the time prescribed. Their first knowledge of danger to their just claims is generally the receivership.

The statute therefore provides for their protection by filing the claim, i. e., giving notice to the receivers and others of their prior rights. 35 Fed., 436; 81 Fed., 440.

If the receivers hold the property by a title superior to such claimants the statute is nugatory.

II.

Being entitled to a prior lien by statute for the amount due appellant is entitled to interest on the amount until paid.

1. The contract of sale, R. p. 11, expressly provided, "Terms 30 days; 1 per cent. discount allowed for payment in ten days."

There was, then, an express term of credit, and payment of interest thereafter is clearly implied by the nature of the promise.

Where interest is implied by the nature of the promise it becomes part of the debt, and is recoverable as of right; but when it is given *as damages it is often a matter of discretion. Redfields* v. *Bartel,* 139 U. S., 694, 701, 703; *Redfields* v. *Iron Co.,* 110 U. S., 174; *R. &c. Constr. Co.* v. *R. &c. R. Co.,* 68 Fed., 115.

In the case at bar therefore interest is a part of the debt and is recoverable as of right. It is not given as damages and is not a matter of discretion.

2. The question of interest is always a question of local law. *Mass. Benefit Assn.* v. *Miles,* 137 U. S., 689; *U. S. Mortg. Co.* v. *Sperry,* 138 U. S., 313; *Ohio* v. *Frank,* 103 U. S., 697; *Holden* v. *Trust Co.,* 100 U. S., 72.

The local law allows interest on statutory supply liens.

Not a single case can be found to the contrary.

The local law likewise establishes the following principles, to-wit:

A. If the contract is silent and does not by implication exclude interest on money due and payable thereunder, the law implies that interest is to be paid from the time the debt becomes payable. *Buchanan* v. *Leewright,* 1 Hen. & Munf., 211.

B. In the absence of an express agreement for the payment of interest, a contract for a certain sum of money imports an obligation to pay interest as a legal *incident of the debt, the right* thereto being *founded on the presumed intention of the*

parties; that is to say, in the language of *Redfields* v. *Bartel,* 139 U. S. supra, it is implied by the nature of the promise and becomes a part of the debt recoverable as of right. *Cecil* v. *Hicks,* 29 Gratt., 1-4-5; *Roberts* v. *Cocke,* 28 Gratt., 207.

C. In contracts for the payment of money, interest is *not given as damages at the discretion of the court or jury,* but as an incident to the debt, *which the court has no discretion to refuse. Chapman* v. *Shepperd,* 24 Gratt., 384; *Roberts* v. *Cocke,* 28 Gratt., 207, 217; *Kent's Admr.* v. *Kent's Admr.,* 28 Gratt., 840, 845; *McVeigh* v. *Howard,* 87 Va., 599, 605, 606; *Tidballs, Exors.* v. *Shenandoah Nat. Bank,* 100 Va., 741.

The State Courts having always construed Sec. 2485 as giving a lien for interest as well as principal that construction is of the highest authority in the Federal courts. In Re West Norfolk Lumber Co., 112 Fed., 769; *Ohio* v. *Frank,* 103 U. S., 697; *N. Y. L. E. & R. Co.* v. *Estill,* 147 U. S., 590.

If, therefore, the question of interest is a question of local law and the interpretation of the statute as giving a lien for interest is binding on the Federal courts, interest must be allowed the appellants.

3. But again, interest is allowed on a stated account, and also at the expiration of an express or an implied term of credit. *Young* v. *Godbe,* 15 Wall, 562; 1 Am. Leading Cas. 5th Ed., 626; *Henderson* v. *Lowell Mach. Shops,* 86 Ky., 668.

In the case at bar the term of credit was express thirty days.

The filing of a lien is equivalent to an account stated, or a liquidated account. *R. &c. Constr. Co.* v. *R. &c. R. Co.,* 68 Fed., 105, 115.

To use the language of the decree herein of August 8, 1908, we think it plain that interest, "according to the terms of the contract upon which the claim is based (as construed by the laws applicable), would have been chargeable on such claim," R. p. 4.

4. The appointment of receivers, and putting the property in custodia legis, did not prevent the running of interest thereafter in the case at bar.

First. Because the receivers took cumonere, i. e., subject to a lien for a debt which carried interest until paid by implied contract.

Second. Because all State decisions construing the lien statute, without exception, allow interest as a part of the debt and as secured by the lien, notwithstanding a receivership.

Third. It has been so held in two cases by the Supreme Court of the United States.

1. The Supreme Court refused a certiorari, in a statutory supply lien case in which interest was allowed, and the allowance complained of. *R. & I. Constr. Co.* v. *R. N. &c. R. Co.,* 34 L. R. A., 633, 68 Fed., 116.

2. The Supreme Court affirmed a case in which $29,828.58 interest was allowed on an equitable supply lien, and refused a rehearing although the petition therefor was based upon *Thomas* v. *Car Co.,* 149 U. S., 116, and upon the allegation that the allowance of interest was contrary to that decision. *So. Ry.* v. *Carnegie Steel Co.,* 176 U. S., 295-6, affirming Simonton, J., 76 Fed., 492.

In both cases receivers were appointed, and in both the Supreme Court allowed interest to run after the appointment, and after the property was held in custodia legis, until payment.

Fourth. Because there has been an enormous diversion of funds in these proceedings, R. pp. 5 to 10, inclusive, and that was the ground for the allowance of interest by the Supreme Court even where the lien was wholly equitable and the allowance of principal as well as interest was a matter of discretion with the court. *Southern Ry.* v. *Carnegie Co.,* 176 U. S., (76 Fed.), supra.

Fifth. The Circuit Court of Appeals for the Sixth Circuit has squarely met the question of interest on statutory supply liens in three cases, and interest is allowed notwithstanding a receivership. *Central Trust Co.* v. *Condon,* 67 Fed., 84-98, Taft, J., (C. C. A.)

Held: "They were liens superior to the bonds. They

should bear interest until paid. *The security and priority of the lien attach as well to interest as to principal."*

In this case it was held, also, that a bill or petition in the receivership suit was a sufficient compliance with the statute requiring suit in a given time, although it was not in the State Court. The lien was thus allowed to be perfected after the receivers were appointed.

In *R. & I. Constr. Co.* v. *R. N. &c. R. Co.,* 68 Fed., 116 (C. C. A.)

Lurton, J., held: "The lien claims of the subcontractors are *by the statute* preferred over the mortgage, and the bondholders are entitled only to that which remains after senior liens are satisfied. *If interest is properly due* as between debtor and creditor, the interest is just as much a part of the preferred claim as the principal thereof." Rehearing and Certiorari refused 34 L. R. A., 633.

In *Jourolmon* v. *Ewing,* 85 Fed., 103-105, (C. C. A.)

Severens, J., held: "It is said that when, as here, the fund for the satisfaction of the lien has been brought into court, and there retained awaiting final disposition the right to interest is suspended. *But the law is settled otherwise."*

Sixth. The Circuit Court of Appeals for the 5th Circuit, Pardee, Shelby and Maxey, J. J., allow interest on lien claims upon funds in custodia legis, awaiting final disposition of the court. *First Nat. Bank* v. *Ewing,* 103 Fed., 168, 190.

Seventh. The Circuit Court of Appeals for the 4th Circuit in no less than six cases has held that interest may be allowed upon supply claims notwithstanding a receivership and insolvency.

Five of these cases were equitable liens and one had to do with liens under statutes.

The only case that can be cited to the contrary in this circuit is the decision upon the Tredegar Co. petition in this case.

Southern Ry. v. *Carnegie Steel Co.,* 76 Fed. 492.
Southern Ry. v. *Am. Brake Co.,* 76 Fed., 502.
Southern Ry. v. *Adams, et als.,* 76 Fed., 504.
Southern Ry. v. *Tillett,* 76 Fed., 507.

In all these cases Simonton, Hughes and Morris, J. J., sat, Morris D. J. dissented on the allowance of interest and cited *Thomas* v. *Western Car Co.,* 149 U. S. 95, as authority.. That question was therefore carefully and fully considered by this court, and interest allowed on account of a diversion of funds.

The decision of the court was affirmed, and *Morris, J., overruled,* by the Supreme Court as we have seen in the principal case of *Southern Ry.* v. *Carnegie Co.,* 176 U. S.

In *Va. P. & P. Co. et als* v. *Lane Bros. Co.,* 174 Fed., 513, 98 C. C. A., 295, December 15, 1909, Judges Goff, Pritchard and Brawley, allowed interest on an equitable lien notwithstanding a receivership semingly because, " the income from current receipts is more than ample for the payment of this claim."

In *Wetzel & Tyler Ry. Co.* v. *Tennis Bros. Co.,* 75 C. C. A., 266, 145 Fed., 458 (C. C. A.), Judges Pritchard, Waddill and McDowell affirmed the decision of the district court and allowed principal and interest to the supply lien claimant under the statute of W. Va. The case thus affirmed was *Tennis Bros.* v. *Wetzel & Tyler Ry. Co.,* 140 Fed., 193-202, in which it was held that the settlement of the lien claim account resulted in "leaving $11,201 *which is entitled to bear interest* from the date of the account filed; that for this sum *and its interest* the plaintiff by the recordation of its account, etc., has acquired a first lien upon the property of said company."

It may not be out of place since the cases have been cited in these proceedings to point out that the case of *Griffith* v. *Boom & L. Co.,* 46 W. Va., 56, dealt with *executory* contracts and the acquisition of prior liens therefor under the W. Va. statute. It was held that the corporation perished upon insolvency *and dissolution,* and that no lien could be acquired on the *unexecuted* portion of a contract under such circumstances. But it was held that a prior lien could be acquired as to the *executed* portion to the extent of just compensation for necessary expenditures of labor and money—and that such lien would be *a prior lien on the assets in the hands of the receivers,* pp. 65-66.

On a second appeal in the same case 55 W. Va., 604, the

court allowed a prior lien for the amount ascertained and *gave interest* on that amount though the property was in custodia legis, in the hands of a receiver, saying: "the sum found to be due him as of the 12*th day of June*, 1901, is $80,288.96 of which $47,873.62 is principal and $32,415.34 is interest." The receiver had been appointed March 10, 1893, and the company was actually insolvent.

Eighth. The authorities relied on to support the contrary contention are either misconstrued or misapplied.

The misconstruction lies in construing a *general rule* as *an invariable rule;* and the misapplication lies in applying this general rule to circumstances other than those for which it is laid down.

The principal case relied on is *Thomas* v. *Western Car Co.*, 149 U. S. 95, as to which we remark:

1. The claim was to priority under *Fosdick* v. *Schall* for car rentals prior to as well as during a receivership, and for repairs to rented cars pursuant to contract.

Priority was refused for rentals prior to the receivership, but allowed for rentals during it, and the repair claim was reduced from $19,696 to $5,775, and also allowed. Interest was refused on all, the court saying: "But the learned judge was of opinion that some allowance of interest should be made because of what he deems to have been a vexatious and unreasonable delay in the payment of what was justly due the car company. As against this view it is urged that the *delay was occasioned by resisting demands* * * *which* * * * *were excessive, if not extortionate.* We cannot agree that a penalty in the name of interest should be inflicted * * * *for resisting claims which we have disallowed.*

"*As a general rule*, after property of an *insolvent* passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed. * * * The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate.

"*We see no reason in departing from this rule in a case like the present*, where such a claim would be paid out of moneys that *fall far short* of paying the mortgage debt."

2. The rule, then, is *not invariable*. It is merely general, and there are cases to which it does not apply.

3. It applies to cases of insolvency where the assets are insufficient to pay the creditors, but plainly has no raison d'etre where the assets are ample to pay them all.

4. But the rule is not invariable even where assets are insufficient and insolvency is real. The trial court held that a vexatious and unreasonable delay in payment was reason for departing from the rule.

The Suprme Court does not deny that fact. It merely holds that the delay was not vexatious and unreasonable, but, on the contrary, was occasioned by resisting claims that were disallowed as excessive if not extortionate, and that in such a case there was no reason to allow interest when it must be paid at the expense of the mortgagees.

Plainly interest may be allowed if the delay is really vexatious and unreasonable.

Again, as we have seen, interest was allowed in 176 U. S., 276, though insolvency and insufficiency of assets were real, on the ground of a diversion of assets; and in *Va. P. & P. Co.* v. *Lane Bros.*, 98 C. C. A., 295, interest was allowed because the assets were ample.

The Thomas Case cites 4 Met., 317, and 10 Gray, 267, and they are full of light as to the rule stated.

In the first, *Williams* v. *Bank*, it was held:

a. Interest may be added to the claims remaining in the hands of an administrator from the time of the report showing that supervening events made the "assets in his hands exceed the amount of the remainder of allowed claims"; in other words, *from the time it appeared the insolvency was only apparent.* So it should be in the case at bar.

b. The Williams Case held, pp. 320, 321, that interest is allowed, "not only by contract, or by way of damages where there is a tortions detention of a debt, *but in many cases upon considerations of equity and natural justice*, where a party is entitled to the payment of money, which, owing to various causes, he cannot obtain"; "not only where payment has been prevented

by the debtor, *but where judgment has necessarily been delayed to await the action of the law*, as where a plaintiff is delayed of his due without fault or want of diligence on his part," p. 321.

We submit, then, that the general rule relied on is open to exception whenever "considerations of equity and natural justice" address themselves to the conscience of the court, even in cases of real insolvency and actual insufficiency.

Not only does the statement of the rule by the court plainly so imply, but the decisions cited, supra, indisputably so hold.

The rule, then, is really a rule of equities, and unless there are equities forbidding the allowance of interest there is no rule denying it.

In cases of purely equitable liens, therefore, the question of interest is wholly in the equitable discretion of the court, as, indeed, is the extent of the lien itself.

c. The Williams Case holds, p. 320, that as between creditors as a body and the heirs, the former were entitled to interest, whereas if the assets were insufficient to pay the creditors principal and interest they should take amongst themselves pro rata.

In the case at bar the prior lienors have not even shared pro rata with the inferior liens, for the latter have received principal and interest while the former have been denied interest. If the statutory grant of a lien prior to the mortgagees means anything, it is submitted that as between prior lienors and creditors without liens, or with secondary liens, the latter are in the position of the heirs, and the former must be paid interest.

Thomas v. *Minot*, 10 Gray, 267, the other case cited in *Thomas* v. *Car Co.*, was again a case of insufficiency of assets; and merely holds that interest should not be paid to one creditor at the expense of the principal of a creditor *of equal rank*— "supposing the statute not to have made any express provision on the subject, or to leave the point in doubt."

The general rule, then, is an equitable intervention between creditors of equal dignity, when the assets are insufficient to pay them all in full.

It yields to any adequate consideration of equity or natural justice. It is not invariable.

It cannot be invoked in aid of the debtor, as is the result of its application in the case at bar; and it has no application in a contest between creditors of unequal rank, or where the statutes have given express priority.

5. Neither *Thomas* v. *Car Co.* nor the cases cited by it involved a prior lien given by statute. The only lien involved was the equitable lien under *Fosdick* v. *Schall.* Such a lien arises from a rule of court. It is limited to supplies furnished within what the court thinks under all the circumstances is a reasonable time. It may vary with the equities of each case. As a consequence, it bears interest or not according to the equities of the case in which it is allowed. It does not exist securing a definite debt until it is allowed by the court, and its extent and incidents are ascertained. It is contingent and inchoate until that decree, and, strictly speaking, it is only after such a decree that the receiver is subordinated to any individual lien claim.

A statutory lien is not susceptible of such variations. It binds the court as well as the receiver. It secures a definite sum which the court cannot enlarge or diminish by a time limit. It relates back to the date of the earliest item of the account.

As was held in *Mott and als.* v. *Wissler Min. Co.,* 135 Fed., 697, of the lien of V. C. 2485, "It attached at the time the supplies were furnished *and not at the time the claim was filed* under 2486." (p. 699.)

> "When a person has furnished supplies he has done the act necessary under the statute to create a lien." (p. 700.)
>
> "The lien provided attaches when the supplies are furnished and *is an existing lien from that time.*"

Just as in that case the lien was held to be prior to the claims of an assignee in bankruptcy, though adjudication occurred before the claim was filed under V. C. 2486, so here the lien is prior to the receiver, as we have seen. It was an existing lien when the receiver took possession, and is for a fixed sum guaranteed priority over the mortgage creditors.

As was held in *Trust Co.* v. *Condon,* 67 Fed., 98, (C. C. A.), by Taft, J.:

"The security and priority of the lien attach as well to interest as to principal."

Continuing his opinion, Taft, J., points out the precise misapplication of *Thomas* v. *Car Co.* that is attempted here:

"This, he says, is not a case where the distribution is to be made pro rata between the lienholders and the bondholders, *in which* case, of course, interest is not to be calculated upon the claims (after sequestration of the property), *so long as the claims cannot be paid in full. Bank* v. *Armstrong,* 59 Fed., 372.

"In the distribution of the proceeds of a common security *between liens of different priorities,* we know of no principle by which interest can be stopped upon the amount of the superior lien until its satisfaction. As between the bondholders and the lienholders, the lienholders are entitled to interest to the day of payment."

So, again, in *R. & I. Constr. Co.* v. *R. N., &c., R. Co.,* 68 Fed., 116 (C. C. A.), Lurton, J., held: "As between the contract company and the sub-contractors there can be no question but that interest should be paid from and after the completion of the work, and the filing of their lien notices as required by statute. That filing is the full equivalent of the rendition of a stated account. *Young* v. *Godbe,* 15 Wall., 565."

"In *Thomas* v. *Car Co.* there seems to have been no definite time agreed upon as to payment and interest was disallowed, because, as the court said, the delay in payment was occasioned by resisting demands which the result of the litigation shows were excessive, if not extortionate. * * * "Neither is there anything in the fact that the company is insolvent, nor in the fact that the allowance of interest will diminish the fund to which the bondholders may look for the payment of their bonds."

"The language relied upon in support of the decree disallowing interest, *from the opinion in Thomas* v. *Car Co.* * * * was not a point upon which that case turned, and was doubtless *intended to apply only to a case where the fund is insufficient to pay all, and the creditors are all*

of the same rank. * * * This is not a case of the distribution of an insufficient fund among lienors of the same rank. The lien claims of the sub-contractors are by the statute preferred over the mortgage."

Again, in *Jourolmon* v. *Ewing*, 85 Fed., 103 (C. C. A.), Severens, J., held: "In *Bank* v. *Armstrong*, 59 Fed., 372, it was held that where a fund was to be shared by creditors without liens, or by those with liens of equal and common rank, interest would not run when the fund is in legal custody. But in *Trust Co.* v. *Condon*, 67 Fed., 84, the counterpart of the rule was recognized and applied, and it was held that where the claims are with liens of different priorities the holders are entitled to interest down to the date of the decree."

The Circuit Court of Appeals for the Fifth Circuit holds the same view of the decision in *Thomas* v. *Car Co.*

First National Bank v. *Ewing*, 103 Fed., 168-190. In that case Judges Pardee, Shelby and Maxey, D. J., held in a contest whether interest should be allowed upon a claim for taxes: "The general rule announced by the Supreme Court (in *Thomas* v. *Car Co.*) is applicable to cases where the fund is to be shared by creditors without liens, or by those having liens of equal and common rank. But where there are claims of several classes, with liens of different priorities, the holders thereof are entitled to interest down to the date of the decree."

In the light of reason and authority, therefore, we think it plain that the Hon. Circuit Judge misconstrued and misapplied the general rule mentioned in *Thomas* v. *Car Co.*, and that appellant is entitled to interest in this case upon the amount of his statutory lien until paid.

III.

A resumé of the argument with some additional authorities follows:

1. Appellant has a prior lien by statute which relates back to and dates from the time the supplies were furnished, and that was anterior to the appointment of receivers. *Bank* v. *Mfg. Co.*, 106 Va., 327.

2. The lien is statutory and is to be liberally construed. The receivers took *cum onere*. *Nat. Bank* v. *Iron Co.*, 35 Fed., 436, 442, 443; *Mott* v. *Wissler*, 135 Fed., 700, 701; *Davis* v. *Alvord*, 94 U. S., 549; *Bank of Commerce* v. *Mechanics, etc., Bank*, 94 U. S., 437, 441; *Richmond* v. *Irons*, 121 U. S., 27, 64; *Guardian, etc., Co.* v. *Fisher et als.*, 200 U. S., 57.

3. The contract was for the payment of money with an express term of credit, and payment of interest being clearly implied by the nature of the promise, it became part of the debt and is recoverable not as damages, but of right. *Curtis* v. *Inerarity*, 6 How., 146, 154; *Phosphate Co.* v. *Grafflin*, 114 U. S., 500; *Spalding* v. *Mason*, 161 U. S., 375, 396; *Hastings et als.* v. *Fire Ins. Co.*, 73 N. Y. App., 141, 152; *Meech* v. *Smith*, 7 Wend., 315, 318.

4. The local law allows interest as of right in such a case which the court has no discretion to refuse, and the question of interest is always one of local law. 4 *Minor's Institutes*, Vol. 1, p. 909; *Cecil* v. *Hicks*, 29 Gratt., 4; *Shipman* v. *Bailey*, 20 W. Va., 140; *Pickens* v. *McCoy*, 24 W. Va., 344; *Sioux City, etc., Co.* v. *Trust Co.*, 172 U. S., 642; *Railway* v. *McCann*, 174 U. S., 586.

5. A receivership does not put an end to the running of interest in a proper case and the security of the lien attaches as well to the interest as to the principal. See cases cited, *supra*.

6. The Circuit Court of Appeals for the Fifth and for the Sixth Circuit so hold (cases cited), and the Circuit Court of Appeals for the Fourth Circuit has always allowed interest until now, having so decided no less than six cases. A seventh, *Guardian, etc., Co.* v. *Guarantee, etc., Co.*, 115 Fed., 184, was certified to the Supreme Court, 200 U. S., 57. This case and *Wetzel, etc., R. Co.* v. *Tennis Bros. Co.*, 75 C. C. A., 266, involved liens given priority by statute and receiverships; in both the priority of the lien was upheld and in the last, interest was allowed. Of the seven cases, the Carnegie case (an equitable lien) was also appealed to the Supreme Court and the allowance of interest and priority was affirmed. In the Carnegie case, Morris, D. J., who concurred in the opinion, but

dissented as to interest, relying upon *Thomas* v. *Car Co.*, was directly overruled, notwithstanding a real insolvency and a deficiency of assets.

7. The appellee's contention may be reduced to syllogistic form of which the major premise must be *Thomas* v. *Car Co.* properly construed. This premise must therefore contain the elements of actual insolvency, a real deficiency of assets, a contest between creditors of equal rank and a claim of an equitable lien which was disallowed. It will become evident at once that the minor premises will contain what the logicians call an undistributed middle, and the syllogism will be a false one.

8. There has been a vexatious, unreasonable and unnecessary delay in the payment of appellant's claim.

9. Appellant is not bound by any of the allegations of the various bills, since he was not allowed to become a party to the suit and could not contest them.

10. Under the decree approving the adjustment plan the appellees must be held as having funds in hand liable to appellant's debt and this entitles him to interest upon the principles of *Malcolmson* v. *Wappoo Mills*, 99 Fed., 633, and *Williams* v. *Bank*, 4 Met., 317, cited in *Thomas* v. *Car Co.*

To deny interest to the appellant in this case would be to reverse the rule construing lien statutes liberally, and would contravene the decisions of this court. Wherefore the question of the honorable Circuit Court of Appeals for the Fourth Circuit should be answered in the affirmative, and it should be directed to enter a decree awarding interest to the appellant.

Respectfully submitted,

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